JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS
455 Golden Gate Avenue
San Francisco, California 94102-3688

Report Summary

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Joyce L. Kennard, Chair
Civil and Small Claims Advisory Committee
Hon. Elihu M. Berle, Chair
Criminal Law Advisory Committee
Hon. Steven Z. Perren, Chair
Heather Anderson, 415-865-7691, heather.anderson@jud.ca.gov
Patrick O'Donnell, 415-865-7665, patrick.o'donnell@jud.ca.gov
Joshua Weinstein, 415-865-7688, joshua.weinstein@jud.ca.gov

DATE: October 2, 2003

SUBJECT: Sealed Records Rules (amend Cal. Rules of Court, rules 12.5, 243.1, and 243.2) (Action Required)

Issue Statement
The rules on sealed records adopted by the Judicial Council effective January 1, 2001, have provided important guidance and direction to the trial and appellate courts on the proper handling of such records. The proposed amendments would improve the standards and procedures relating to these records. The sealed records rules should be amended to clarify the standard for unsealing records, to specify that express factual findings are required to seal records, and to improve the procedures for requesting that documents obtained through discovery be placed under seal.

Recommendation
The Appellate, Civil, and Criminal Law Advisory Committees[1] recommend that the Judicial Council, effective January 1, 2004:

1. Amend rule 12.5 of the California Rules of Court on sealing and unsealing records on appeal;

[1] All three advisory committee have considered these rules proposals. Although each committee focused on its primary areas of interest and expertise, the final proposals were reviewed and are recommended by all three committees.

2. Amend rule 243.1 on the findings required to seal records; and

3. Amend rule 243.2 on the procedures for sealing and unsealing records in the trial courts.

The text of the amended rules is attached to the report at pages 10–18.

Rationale for Recommendation

The first statewide rules on the filing of records under seal (Cal. Rules of Court, rules 12.5, 56, and 243.2–243.4) were adopted by the Judicial Council, effective January 1, 2001. Because the sealed record rules have been in effect for a while, it was appropriate this year to undertake a general review of the rules. In addition, some specific proposals for improving the sealed records rules that were recently submitted needed to be considered.

Three Judicial Council advisory committees reviewed the rules and proposals, solicited additional proposals, and developed proposed amendments to rules 12.5, 243.1, and 243.2. The principal issues addressed by the amendments are: (1) clarifying the standard to be considered for *unsealing* records in the trial and appellate courts, (2) specifying that express *factual* findings are required to seal records, and (3) providing a party whose asserted *confidential documents were obtained through discovery* with notice and an opportunity to request a sealing order in the trial court when another party intends to use the documents for adjudication, but does not intend to request that they be sealed. In addition, some other amendments should be made to the rules based on suggestions from the public.

Alternative Actions Considered

There were different viewpoints as to the best procedures for handling assertedly confidential documents obtained through discovery and potentially to be sealed. The advisory committees recommend adding new subdivision (b)(3) to rule 243.2 to deal with this situation. This provision provides a procedure requiring that a party—who intends to use for adjudication purposes another party's documents that are subject to a confidentiality agreement or protective order, but does not intend to request that the documents be sealed—must lodge the documents conditionally under seal and notify the other party so that that party will have an opportunity to file a motion or application to seal. The party whose documents are involved would have 10 days within which to bring a motion or application to seal. If no motion or application is filed, the records would be made public.

Some commentators proposed a significantly different procedure. Specifically, two attorneys suggested that parties to a pending motion should be allowed to stipulate to—

and courts should be allowed to enter—protective orders providing that all documents containing information subject to a motion to seal be lodged temporarily in their entirety (without requiring a public redacted version to be filed during the time that the motion to seal is pending) and that the party designating the information as confidential should be required to file a motion to seal as confidential under rules of court *after* the court's hearing on the substantive motion.

Although this alternative approach would simplify the process of ruling on motions to seal, it raises significant problems. In particular, it seems improper under the First Amendment and inconsistent with the policy of open court records for courts to decide substantive motions based on documents that have been lodged temporarily under seal and that are unavailable to the public. The advisory committees concluded that courts should rule on whether any documents may be filed under seal *before* proceeding to adjudicate matters on the merits; and therefore they recommend the adoption of proposed rule 243.2(b)(3) instead of the alternative proposed by the commentators.

Comments From Interested Parties

A total of 13 comments were received on the proposed rules. Most of the commentators agreed with the proposals. There were a few qualifications and some suggestions for additional changes to the rules. And as indicated above, two commentators proposed a significantly different approach to the sealing of records than that recommended by the advisory committees. Based on the comments, the committees made some modifications to the proposed amended rules, but retained the same basic approach as proposed in the version circulated for comment.

Implementation Requirements and Costs

The sealed records rules and the new amendments will be implemented by the trial and appellate courts whenever the issue of sealing or unsealing records arises. The specific amendments proposed at this time should, in a number of respects, simplify the process of sealing or unsealing records and provide additional guidance and procedures in areas not previously covered. The sealed records rules will necessarily impose some burdens on courts and litigants; however, these are necessary to preserve the basic principle that court records are presumed to be open and should be sealed only upon a sufficient legal and factual showing.

Attachments

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Issue Statement

The rules on sealed records adopted by the Judicial Council effective January 1, 2001, have provided important guidance and direction to the trial and appellate courts on the proper handling of such records. The proposed amendments would improve the standards and procedures relating to sealed records. The sealed records rules should be amended to clarify the standard for *unsealing* records, to specify that express *factual* findings are required to seal records, and to improve the procedures for requesting that documents *obtained through discovery* be placed under seal.

Recommendation

The Appellate, Civil, and Criminal Law Advisory Committees[1] recommend that the Judicial Council, effective January 1, 2004:

1. Amend rule 12.5 of the California Rules of Court on sealing and unsealing records on appeal;

[1] All three advisory committee have considered these rules proposals. Although each committee focused on its primary areas of interest and expertise, the final proposals were reviewed and are recommended by all three committees.

2. Amend rule 243.1 on the findings required to seal records; and

3. Amend rule 243.2 on the procedures for sealing and unsealing records in the trial courts.

The text of the amended rules is attached at pages 10–18.

Rationale for Recommendation

Overview

The first statewide rules on the filing of records under seal were adopted by the Judicial Council, effective January 1, 2001 (See Cal. Rules of Court, rules 12.5, 56, and 243.2–243.4).[2] These rules have been of substantial assistance in providing guidance for the trial and appellate courts on the proper standard for sealing records under *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. The rules also provide procedures for handling records to be filed under seal.

Last year, some stylistic changes were made to rule 12.5. Also, a set of special rules relating to the filing, unfiling, and management of sealed records in False Claims Act cases were adopted. (See rules 243.5–243.8.) However, the main sealed record rules for the trial courts have not been amended since they were adopted three years ago. Because the sealed record rules have been in effect for a while, it was appropriate this year to undertake a general review of the rules. In addition, some specific proposals for improving the sealed records rules that were recently submitted needed to be considered.

Three Judicial Council advisory committees reviewed the rules and proposals, solicited additional proposals, and developed proposed amendments to rules 12.5, 243.1, and 243.2. The principal issues addressed by the amendments are: (1) clarifying the standard to be considered for *unsealing* records in the trial and appellate courts, (2) specifying that express *factual* findings are required to seal records, and (3) providing a party whose asserted *confidential documents were obtained through discovery* with notice and an opportunity to request a sealing order in the trial court when another party intends to use the documents for adjudication, but does not intend to request that they be sealed. In addition, some other amendments should be made to the rules based on suggestions from the public.

Amendments to Rules Relating to Both the Trial and Appellate Courts

1. Unsealing of Records

The rules adopted in 2001 were fairly detailed regarding the standards and procedures for sealing records, but not those for unsealing them. Thus, one of the main recommendations for changing the rules at this time concerns the provisions for unsealing records. In both the trial and appellate rules, a new provision would be added stating: "In determining whether to unseal a records, the court must consider the matters addressed in rule

[2] All references to rules in this report relate to the California Rules of Court.

243.1(c)–(e)." (Rules 12.5(f)(4) and 243.2(h)(4).)
Thus, the amended rules will clarify that, in *unsealing* records, the trial and reviewing courts must consider that court records are presumed to be open and that they may be sealed only if the standards stated in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, *supra,* are satisfied.[3] This standard is different from the standard that must be applied in sealing a record. To seal a record, the court must make a set of express *factual* findings.[4] By contrast, to unseal a record, the court only needs to consider whether the factors necessary to justify sealing are present. Depending on the circumstances, a single legal determination (e.g., that there is no overriding interest that overcomes the right of public access) or a single fact (e.g., that a claimed privilege has been waived) may be sufficient to warrant unsealing a record.

The rules presently provide that a trial or an appellate court may unseal a record on its own motion. If the court intends to do so, it must give notice to the parties. The rules would be amended to state that if after notice from the court, one party files an opposition to unsealing the record, any other party may file a response within five days after the filing of the opposition. (Rules 12.5(f)(3) and 243.2(h)(3).)

Another new provision relating to unsealing records requires the court to state the scope of any order unsealing the record. The following provision would be added to both the trial and appellate rules:

> The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If, in addition to the records in the envelope or container, a court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

(See amended rules 12.5(f)(5) and 243.2(h)(5).)

2. Other Rule Amendments Applicable to All Courts
Several other changes would be made to both the appellate and the trial court rules. First, the amended rules would authorize parties to request that records be sealed or unsealed by an ex parte application as well as by a noticed motion. (See, e.g., rules 12.5(c)(2), 12.5(f), 243.2(b), and 243.2(h).) This change is made in recognition that there

[3] The proposed new provision applies to original motions to unseal. It does not prescribe the standard to be used in the appellate courts for reviewing a decision to seal by the trial court, which is a separate issue. (See *In Re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 301–303.)

[4]Under the proposed amended rules, rule 243.1(d) would be changed to further clarify that express factual findings are required to seal a record.

are sometimes situations in which a request to seal or unseal a record needs to be made within a shorter time frame than that required for a noticed motion. For example, when a request to seal records is made not with an underlying motion, but in connection with an opposition or reply, the request to seal often needs to be presented in an expedited manner, so that it can be considered before the underlying motion. Hence, under certain circumstances, an ex parte application to seal may be the proper means by which to make a request to seal a record.

Second, the rules would be amended to indicate that requests to unseal may sometimes be made by petition—for example, by a petition brought by a non-party—as well as by motion. (See amended rules 12.5(f) and 243.2(h).)

Third, the rules would be amended to eliminate the current ambiguity regarding the documents that must be served in connection with a motion to seal. A provision would be added stating: "Unless the court orders otherwise, any party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version." (See amended rules 12.5(e)(4) and 243.2(b)(2).)

Fourth, the rules would be amended to clarify what happens to lodged records if a request to seal is denied. Currently, the rules state that, if the request is denied, the clerk must return the records to the moving or submitting party. The amended rules would provide that the clerk must return the records to the submitting party "unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed." (See amended rules 12.5(e)(7) and 243.2(b)(6).) This new provision recognizes that a party, who has been unsuccessful in obtaining an order sealing records in connection with a pending motion, may nonetheless want to use the records in connection with that party's underlying motion.

Finally, in both the appellate and trial court rules, a new provision would be added that states: "Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in any subsequently filed records or papers." (See amended rules 12.5(e)(9) and 243.2(e)(4).) This provision is intended to clarify that the sealing order applies to later-filed records and papers unless the court orders otherwise.

Amendments to Rules Relating to Reviewing Courts

A new provision would be added to the appellate rules would clarify that a sealed record must not be unsealed except by order of the court. (See amended rule 12.5(f)(1).) This is similar to a provision already contained in the trial court rules. (See rule 243.2(e)(4) relocated to amended rule 243.2(h)(1).)

Amendments to Rules Relating to the Trial Courts

In the trial court rules, rule 243.1(d) would be amended to clarify that the court must make express *factual* findings before sealing a record. That is, it must find facts that establish that the standard announced in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, *supra*, is satisfied. This requirement, which is stated less clearly in the present version of the rule, would eliminate the problem that some motions and orders for the sealing of records are currently being stated in conclusory terms.

The main new provision in the trial court rules would be subdivision (b)(3) of rule 243.2. This provision addresses a situation that is not explicitly covered under the existing rules. When a party who has obtained documents under a confidentiality agreement or a protective order wants to use them in a motion or a trial, that party may not be concerned about whether the documents are filed under seal. But the party who produced the documents in discovery may care a great deal. In this situation, it would be helpful for there to be procedures directing the courts and litigants as to the proper actions to take.

Currently, some courts allow a party seeking to use confidential documents to lodge them conditionally under seal; then the other party may bring a motion to seal before the underlying motion is heard or the documents are used at trial. Other courts require the party seeking to use the documents to notify the other party that it intends to use the documents. That other party, if it wants, may then file a motion seeking to have the documents filed under seal. Still other courts apply a combination of these approaches.

Rather than each court developing its own procedures for handling these matters, it is preferable to have a uniform statewide procedure on this subject. Hence, the committees recommend the adoption of new subdivision (b)(3) of rule 243.2. This provision provides a procedure requiring that a party—who intends to use for adjudication purposes another party's documents that are subject to a confidentiality agreement or protective order, but does not intend to request that the documents be sealed—must lodge the documents conditionally under seal and notify the other party so that that party will have an opportunity to file a motion to seal. The party whose documents are involved would have 10 days within which to bring a motion or application to seal. If no motion or application is filed, the records would be made public.[5]

Alternative Actions Considered

There were widely different viewpoints as to the best procedures for handling assertedly confidential documents obtained through discovery and potentially to be sealed. As discussed above, the advisory committees recommend adding new subdivision 243.2(b)(3)

[5] This new provision is derived, in part, from Local Rule 10.5 of the San Francisco Superior Court and the procedures of the Santa Clara Superior Court for handling confidential materials in complex cases.

to deal with this situation. However, some commentators proposed a significantly different procedure.

Specifically, two attorneys suggested that parties to a pending motion should be allowed to stipulate to—and courts should be allowed to enter—protective orders providing that all documents containing information subject to a motion to seal be lodged temporarily in their entirety (without requiring a public redacted version to be filed during the time that the motion to seal is pending) and that the party designating the information as confidential should be required to file a motion to seal it as confidential under rules of court *after* the court's hearing on the substantive motion. Once the rulings on the substantive motion and the motion to seal are decided, the moving party would then prepare a public redacted version of the documents filed in the substantive and sealing motions based on the court's order.[6]

Although this alternative approach would simplify the process of ruling on motions to seal, it raises significant problems. In particular, it seems improper under the First Amendment and inconsistent with the policy of open court records for courts to decide substantive motions based on documents that have been lodged temporarily under seal and that are unavailable to the public. The decision-making process of the courts should be open and public. As Justice Blackmun stated, "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors, with records supporting the court's decision sealed from public view." (*Gennett Co. v. DePasquale* (1979) 443 U.S. 368, 429 (citation omitted; Blackmun, J., concurring and dissenting).) The advisory committees concluded that courts should rule on whether any documents may be filed under seal *before* proceeding to adjudicate matters on the merits. These committees therefore recommend the adoption of proposed rule 243.2(b)(3) instead of the alternative proposed by the commentators.

Comments From Interested Parties

A total of 13 comments were received on the proposed rules.[7] The commentators included the State Bar's Appellate Committee and Committee on the Administration of Justice, a superior court rules committee, a local bar association, several private attorneys, an attorney with the California Appellate Project, a presiding judge, and several court executives. The Judicial Council's Court Executives Advisory Committee also reviewed the amended rules.

Most of the commentators agreed with the proposals. There were a few qualifications and some suggestions for additional changes to the rules. And as indicated above, two

[6]See James G. Snell and Huong T. Nguyen, "Sealing Records Rules Create Some Ambiguities and Burdens," *San Francisco Daily Journal* (July 17, 2002), p. 5.

[7] A chart summarizing the comments and the committee's responses is attached at pages 19–41.

commentators proposed a different approach to the sealing of records than that recommended by the advisory committees.

The Judicial Council's Court Executives Advisory Committee supported the proposed amendments without changes.

The State Bar's Committee on the Administration of Justice (CAJ) indicated that it strongly supported the current rules and the proposed rules, with one exception. Some CAJ members were concerned that allowing records to be sealed on an ex parte basis could undermine the principles of public access affirmed in *NBC Subsidiary (KNBC) Inc. v. Superior Court*, *supra*. They were even more concerned that unsealing records on an ex parte basis might result in records being too easily disclosed. A similar concern about ex parte applications was expressed by members of the State Bar's Appellate Committee. These commentators believed that parties should be required to file noticed motions or petitions instead of making applications to seal or unseal records.

The advisory committees did not agree with the commentators on the issue of ex parte applications. They believe that ex parte procedures for sealing and unsealing records in the trial courts and on appeal would be very useful and would simplify or expedite the litigation of sealed records issues. In addition, ex parte applications would contain adequate safeguards to protect the parties and the public. Ex parte applications to seal or unseal records would require notice to all other parties. (See Cal. Rules of Court, rule 379.) Also, requests to seal made by application would still need to satisfy the rigorous standards and factual requirements of rule 243.1(d). Hence, the advisory committees recommend retaining the ex parte procedures contained in the proposed amendments to the sealed records rules.

Commentators on the appellate rules suggested amending rule 12.5 to provide specific procedures for opposing motions to seal. The Appellate Advisory Committee did not believe that it is necessary to provide express provisions in rule 12.5(e) concerning the filing of oppositions to motions to seal. The general provisions of rule 41 authorizing the filing of oppositions to motions generally apply to motions under rule 12.5(e). Also, the right to file an opposition to a motion to seal is clearly contemplated by rule 12.5(e)(4), which refers to “any opposition” filed in the matter. Thus, the provisions in rule 41do not need to be duplicated in rule 12.5(e).

A commentator suggested a rule requiring that an order granting or denying a sealing request be in writing. The committees did not think this was necessary. While it is often good to have written orders, it is not always necessary so long as the record is sufficiently clear about the basis for the court’s order.

A commentator suggested that, when a court intends to unseal a record on its own motion, it should give the parties its reasons so that they can adequately respond. The Appellate

Advisory Committee and the Civil and Small Claims Advisory Committee responded differently to this suggestion. On the one hand, the Appellate Advisory Committee did not think a reviewing court should be required to specify the reasons it is considering unsealing records that were sealed at the trial court. The committee noted that, in these circumstances, the reviewing court is not determining whether to reverse the trial court's order sealing records in the trial court; it is making an independent determination about whether it is appropriate for records in its own proceedings to be sealed. The committee believed that, in these circumstances, the burden of justifying sealing in the reviewing court remains on the party who requested sealing and, therefore, that it is appropriate for such parties to address all of the factors necessary for sealing under the rules. The committee further believed that if the rules required reviewing courts to state the reasons they are considering unsealing, reviewing courts would routinely articulate these reasons in broad terms, such that the parties would still be required to address all of factors necessary for sealing under the rules. Thus, the committee believed that such a rule change would create additional hurdles for the court without appreciably narrowing the burden on the parties. The Appellate Advisory Committee therefore did not support adding such a provision to rule 12.5.

On the other hand, the Civil and Small Claims Advisory Committee agreed with the commentator's suggestion that a trial court should be required to indicate why it intends, on its own motion, to unseal a record. Such a statement from the court would give the parties clearer guidance as to how to respond to the motion. The committee recognized that there is a greater need for the court to give its reasons for unsealing a record at the trial court level because that court has previously ordered the record sealed; hence, parties will generally need to know why the court is considering changing its order in order to respond. Accordingly, the Civil and Small Claims Advisory Committee added a provision to rule 243.2 requiring the trial court to state the reasons for its proposed unsealing of the record. (See amended rule 243.2(h)(3).)

A court rules committee proposed modifying rule 243.1(a)(2) to indicate that the sealed records rules do not apply to search warrant applications sealed pursuant to *People v. Hobbs* (1994) 7 Cal.4th 948. The Criminal Law Advisory Committee reviewed this comment. It agreed generally with the proposal, but concluded that a statement on this matter should be added to the Advisory Committee Comment to rule 243.1 instead of being included in the rule itself.

Finally, Snell and Nguyen, the authors of the article that proposed an alternative approach to that used in the current and amended sealed records rules, submitted an extensive comment. They recommended that the rules should allow proposed sealed records to be lodged confidentially and that the court should determine whether these records are to be sealed *after* considering the underlying motion. As discussed above, the committees disagreed with the commentators. They concluded it would be both more constitutionally

sound and better public policy for courts to determine whether records should be sealed *before* adjudicating the merits of claims.

Implementation Requirements and Costs

The sealed records rules and the new amendments will be implemented by the trial and appellate courts whenever the issue of sealing or unsealing records arises. The specific amendments proposed at this time should, in a number of respects, simplify the process of sealing or unsealing records and provide guidance and procedures in areas not previously covered. The sealed records rules will necessarily impose some burdens on courts and litigants; however, these rules are necessary to preserve the basic principle that court records are presumed to be open and should be sealed only upon a sufficient legal and factual showing.

Attachments

Rules 12.5, 243.1, and 243.2 of the California Rules of Court are amended, effective January 1, 2004, to read:

Rule 12.5. Sealed records

(a) Application

This rule applies to sealed records and records proposed to be sealed on appeal and in original proceedings under rule 56, but does not apply to records required to be kept confidential by law.

(b) Definitions

(1) "Record" means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court.

(2) A "sealed" record is a record closed to public inspection by court order.

(3) A "lodged" record is a record temporarily deposited with the court but not filed.

(c) Record sealed by the trial court

If a record sealed by the trial court is part of the record on appeal:

(1) The sealed record must be filed under seal in the reviewing court and remain sealed unless that court orders otherwise under (f).

(2) The record on appeal must include:

(A) the motion or application to seal;

(B) all documents filed in the trial court supporting or opposing the motion or application; and

(C) the order sealing the record.

(3) The reviewing court may examine the sealed record.

(d) Record not sealed by the trial court

A record filed or lodged publicly in the trial court and not ordered sealed by that court must not be filed under seal in the reviewing court.

(e) Record not filed in the trial court; motion or application to file under seal

(1) A record not filed in the trial court may be filed under seal in the reviewing court only by order of that court; it must not be filed under seal solely by stipulation or agreement of the parties.

(2) To obtain an order under (1), a party must serve and file a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing. ~~With that motion~~ At the same time, the party must lodge the record under (3), unless good cause is shown not to lodge it.

(3) To lodge a record, the party must put the record in ~~a manila~~ an envelope or other appropriate container, seal it, and attach a cover sheet that complies with rule 44(d) and labels the contents as "CONDITIONALLY UNDER SEAL."

(4) If necessary to prevent disclosure, ~~the~~ any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal. Unless the court orders otherwise, any party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version.

(5) On receiving a lodged record, the clerk must note the date of receipt on the cover sheet and retain but not file the record. The record must remain conditionally under seal pending determination of the motion or application.

(6) The court may order a record filed under seal only if it makes the findings required by rule 243.1(d)–(e).

(7) If the court denies the motion or application, the clerk must not place the lodged record in the case file but must return it to the ~~moving~~ submitting party unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed.

(8) An order sealing the record must direct the sealing of only those documents and pages or, if reasonably practical, portions of those documents and pages, that contain the material that needs to be placed

under seal. All other portions of each document or page must be included in the public file.

(9) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in any subsequently filed records or papers.

(f) Unsealing a record in the reviewing court

(1) A sealed record must not be unsealed except upon order of the court.

~~(1)~~(2) Any person or entity may serve and file a motion, application or petition in the reviewing court to unseal a record. If necessary to preserve confidentiality, the motion, application, or petition, any opposition, and any supporting documents must be filed in both a public redacted version and a sealed complete version.

~~(2)~~(3) If the reviewing court proposes to order a record unsealed on its own motion, the court must mail notice to the parties. Any party may serve and file an opposition within 10 days after the notice is mailed or within such time as the court specifies. Any other party may file a response within 5 days after the filing of an opposition.

~~(3)~~(4) In determining whether to unseal a record, the court must consider the matters addressed in rule 243.1(c)–(e).

~~(4)~~(5) The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If, in addition to the records in the envelope or container, a court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

(g) References to nonpublic material in public records prohibited

A record filed publicly in the reviewing court must not disclose material contained in a record that is sealed, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal.

Rule 243.1. Sealed records

(a) [Applicability]

(1) Rules 243.1–243.4 apply to records sealed or proposed to be sealed by court order.

(2) These rules do not apply to records that are required to be kept confidential by law. These rules also do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings. The rules do apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.

(b) [Definitions]

(1) "Record." Unless the context indicates otherwise, "record" as used in this rule means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court.

(2) "Sealed." A "sealed" record is a record that by court order is not open to inspection by the public.

(3) "Lodged." A "lodged" record is a record that is temporarily placed or deposited with the court but not filed.

(c) [Court records presumed to be open] Unless confidentiality is required by law, court records are presumed to be open.

(d) [Express <u>factual</u> findings required to seal records] The court may order that a record be filed under seal only if it expressly finds ~~that~~ <u>facts that establish</u>:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

(e) [Content and scope of the order]

(1) An order sealing the record must (i) specifically set forth the facts~~ual findings~~ that support the ~~order~~ findings, and (ii) direct the sealing of only those documents and pages, ~~/~~ or, if reasonably practicable, portions of those documents and pages, ~~/~~ that contain the material that needs to be placed under seal. All other portions of each document~~s~~ or page must be included in the public file.

(2) Consistent with Code of Civil Procedure sections 639 and 645.1, if the records that a party is requesting be placed under seal are voluminous, the court may appoint a referee and fix and allocate the referee's fees among the parties.

Advisory Committee Comment

This rule and rule 243.2 provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. These rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. The rules do not apply to records that courts must keep confidential by law. Examples of confidential records to which public access is restricted by law are records of the family conciliation court (Family Code, § 1818(b)), ~~and~~ in forma pauperis applications (Cal. Rules of Court, rule 985(h)), and search warrant affidavits sealed under *People v. Hobbs* (1994) 7 Cal.4th 948. The sealed records rules also do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1208–1209, fn. 25.)

Rule 243.1(d)–(e) is derived from *NBC Subsidiary*. That decision contains the requirements that the court, before closing a hearing or sealing a transcript, must find an "overriding interest" that supports the closure or sealing, and must make certain express findings. (*Id*. at pp. 1217–1218). The decision notes that the First Amendment right of access applies to records filed in both civil and criminal cases as a basis for adjudication. (*Id.* at pp. 1208–1209, fn. 25.) Thus, the *NBC Subsidiary* test applies to the sealing of records.

NBC Subsidiary provides examples of various interests that courts have acknowledged may constitute "overriding interests." (See *id. a*t p.1222, fn. 46.) Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute "overriding interests."

The rules do not attempt to define what may constitute an "overriding interest," but leave this to case law.

Rule 243.2 Procedures for filing records under seal

(a) [Court approval required] A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely upon the agreement or stipulation of the parties.

(b) [Motion or application to seal a record]

(1) A party requesting that a record be filed under seal must file a ~~noticed~~ motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing.

(2) A copy of the motion or application must be served on all parties who have appeared in the case. Unless the court orders otherwise, any party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version.

(3)(A) A party who files or intends to file with the court for the purposes of adjudication or to use at trial records produced in discovery that are subject to a confidentiality agreement or protective order, and does not intend to request to have the records sealed, must:

(i) lodge the unredacted records subject to the confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records, in the manner stated in (d);

(ii) file copies of the documents in (i) that are redacted so that they do not disclose the contents of the records that are subject to the confidentiality agreement or protective order; and

(iii) give written notice to the party who produced the records that the records and the other documents lodged under (i) will be placed in the public court file unless that party files a timely motion or application to seal the records under this rule.

(B) If the party who produced the documents and was served with the notice under (A)(iii) fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk must promptly remove all the documents in (A)(i) from the envelope or container where they are located and place them in the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court.

~~(2)~~(4) The party requesting that a record be filed under seal must lodge it with the court under (d) when the motion or application is made, unless good cause exists for not lodging it or the record has previously been lodged under (3)(A)(i). Pending the determination of the motion or application, the lodged record will be conditionally under seal.

~~(3)~~(5) If necessary to prevent disclosure, ~~the~~ any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal.

~~(4)~~(6) If the court denies the motion or application to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed.

(c) [References to nonpublic material in public records] A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion or an application to seal.

(d) [Lodging of records ~~that a party is requesting be placed under seal~~]

(1) ~~The party requesting that~~ A record that may be filed under seal must be put ~~it~~ in an ~~manila~~ envelope or other appropriate container, sealed in the envelope or container, and lodged ~~it~~ with the court.

(2) The envelope or container lodged with the court must be labeled "CONDITIONALLY UNDER SEAL."

(3) The party submitting the lodged record must affix to the envelope or container a cover sheet that:

~~(i)~~(A) Contains all the information required on a caption page under rule 201; and

~~(ii)~~(B) States that the enclosed record is subject to a motion or an application to file the record under seal.

(4) Upon receipt of a record lodged under this rule, the clerk must endorse the affixed cover sheet with the date of its receipt and must retain but not file the record unless the court orders it filed.

(e) [Order]

(1) If the court grants an order sealing a record, the clerk must substitute on the envelope or container for the label required by (d)(2) a label prominently stating, "SEALED BY ORDER OF THE COURT ON *(DATE)*," and must replace the cover sheet required by (d)(3) with a filed-endorsed copy of the court's order.

(2) The order must state whether—in addition to records in the envelope or container—the order itself, the register of actions, any other court records, or any other records relating to the case are to be sealed.

(3) The order must state whether any person other than the court is authorized to inspect the sealed record.

~~(4) A sealed record must not be unsealed except upon order of the court.~~

(4) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in any subsequently filed records or papers.

(f) [Custody of sealed records] Sealed records must be securely filed and kept separate~~ly~~ from the public file in the case.

(g) [Custody of voluminous records] If the records to be placed under seal are voluminous and are in the possession of a public agency, the court may by written order direct the agency instead of the clerk to maintain custody of the original records in a secure fashion. If the records are requested by a

reviewing court, the trial court must order the public agency to deliver the records to the clerk for transmission to the reviewing court under these rules.

(h) [Motion, application, or petition to unseal records]

(1) A sealed record must not be unsealed except upon order of the court.

(2) A party or member of the public~~, or the court on its own motion,~~ may move, apply, or petition, or the court on its own motion may move, to unseal a record. Notice of ~~the~~ any motion, application, or petition to unseal must be filed and served on ~~the~~ all parties in the case. The motion, application, or petition and any opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary to comply with (c).

(3) If the court proposes to order a record unsealed on its own motion, the court must mail notice to the parties stating the reason therefor. Any party may serve and file an opposition within 10 days after the notice is mailed or within such time as the court specifies. Any other party may file a response within 5 days after the filing of an opposition.

(4) In determining whether to unseal a record, the court must consider the matters addressed in rule 243.1(c)–(e).

(5) The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If, in addition to the records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

SPR03-10
Sealed Records
(amend Cal. Rules of Court, rules 12.5, 243.1, and 243.2)

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
1.	General	Committee on Administration of Justice State Bar of California San Francisco	AM	Y	The State Bar of California's Committee on Administration of Justice ("CAJ") has reviewed and analyzed the proposed changes to the California Rules of Court and the Judicial Council forms. CAJ commends the Civil and Small Claims Advisory Committee for its excellent work on these proposals, and appreciates the opportunity to submit the following comments. **a. Legal background considered by CAJ in connection with the proposed amendments to the sealed records rules** In connection with its consideration of the proposed amendments to the rules on the filing of records under seal, CAJ considered the following legal background. Rules 12.5, 56(e), and 243.1–243.4 took effect January 1, 2001. Rule 243.1(d)-(e) is "derived from" the California Supreme Court's decision in *NBC Subsidiary (KNBC), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999)…. In *NBC Subsidiary*, the California Supreme Court unanimously affirmed that the public's First Amendment right of access to court proceedings extended to civil cases and recognized the well-established constitutional presumption that court records must be open to the public. 20 Cal. 4th at 1197-1209 & n.25. Based on its thorough review of United States Supreme Court authority, the court declared that a court cannot close a judicial proceeding or seal a court record without first finding: (1) that an overriding interest supports sealing; (2) that a substantial probability exists that the interest will be prejudiced absent sealing; (3) that the sealing is narrowly tailored to serve the overriding interest; and (4) that no less	The committees agreed generally with the CAJ's analysis of the sealed records rules.

* These comments were reviewed by the Appellate, Civil and Small Claims, and Criminal Law Advisory Committees.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					restrictive means exists to achieve the identified overriding interest. *Id* at 1218–19. Rule 243.1(d) presently mandates that judicial records cannot be sealed unless a court finds that these elements are met. Rule 243.2(b) presently requires the party advocating sealing to file a notice motion, memorandum of points and authorities, and declaration containing facts sufficient to justify the sealing. As noted above, the First Amendment guarantees that all documents filed or lodged in criminal and civil proceedings are presumptively open to the public. *See Copley Press v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992) ("both the federal. . .and state. . .constitutions provide broad access rights to judicial hearings and records both in criminal and civil cases"). This presumption applies with equal force to documents that otherwise might be entitled to confidentiality once those documents are submitted to a court. For example, this doctrine was recognized and applied in *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1179-80 (6th Cir. 1983), where the Sixth Circuit addressed the propriety of a trial court order sealing tobacco company documents that were filed by the FTC in a district court proceeding. *Id.* Brown & Williamson argued that the documents should be sealed even after they were filed in court proceedings because the company originally submitted them to the FTC pursuant to a federal statute guaranteeing that the documents "shall be considered confidential…and shall not be disclosed." *Id*. at 1180. Despite that express statutory assurance of confidentiality, the Sixth Circuit declined to carve out an exception to the right of access to the	

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					documents that were filed in the district court proceeding, and vacated the sealing order. *Id.* at 1180–81…. As these and other cases demonstrate, documents that may be entitled to confidentiality in certain contexts become subject to the public's right of access when they are filed or lodged with a court. Once filed with a court, such documents—like any other documents presented to a court—may be sealed only if the party advocating sealing can satisfy the strict constitutional standards reaffirmed by the California Supreme Court in *NBC Subsidiary* and incorporated in rule 243.1(d). Ultimately, arguments that rule 243.2 is too burdensome fundamentally devalue the public's constitutional right of access. Access to court proceedings and court documents allows the public to participate in and serve as a check on the judicial process. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-06 (1982). Access also maintains the public's confidence in judicial proceedings. *See Press-Enterprise v. Superior Court*, 464 U.S. 501, 509 (1984) ("Press-Enterprise I"). As Justice Blackmun explained, "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, *with the records supporting the court's decision sealed from public view." Gannett Co. v. DePasquale*, 443 U.S. 368, 429 (1979) (citation omitted; Blackmun, J. concurring and dissenting; emphasis added). Any purported burden on litigants is insufficient to overcome the vital public interests	

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					served by the constitutional right of access to court records. **b. CAJ's conclusions concerning the proposed amendments to the sealed records rules** The Judicial Council's proposed changes to the rules on the filing of records under seal appropriately recognize that the First Amendment right of access must take precedence over procedural convenience. CAJ believes the Judicial Council has reached the appropriate balance. The proposed rules are also clear and understandable. In particular, CAJ supports regularizing the process for sealing and unsealing records across the courts, and rule changes which make it clear that members of the public are entitled to oppose the sealing of records and to seek to open sealed records. CAJ supports the proposed rule changes, with one exception. CAJ has concerns regarding the proposed amendments that would provide for ex parte relief. Some members of CAJ were concerned that sealing records on an ex parte application could undermine *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999), because interested parties would not have sufficient notice to oppose sealing and the courts may not have sufficient time to fully consider the factors that must be addressed prior to sealing the records. While ex parte relief may be warranted in some cases, in others parties may attempt to obtain a rushed decision by seeking relief on an ex parte basis, thereby preempting a thoughtful and considered determination of whether the elements set fort in rule 243.1(d) have been	The committees agreed. The committees did not agree with the members of the CAJ who were concerned about ex parte applications for the sealing or unsealing of records. The committees think that adding the option to apply for ex parte relief relating to the sealing and unsealing of records will make the rules more flexible and practical,

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					satisfied. While the rules also provide for unsealing records, as a practical matter once a judge has sealed a record the judge may be disinclined to revisit that decision. Accordingly, if records are to be sealed on an ex parte basis, the rules should clarify what standard should be met to obtain ex parte relief, and ensure that the Court can make a sufficient record that it considered all the factors required by rule 243.1(d). The proposed changes to the rules also provide for *unsealing* records on an ex parte basis. This aspect of the proposal was more troubling to CAJ, which was concerned that a record could be unsealed on the basis of an ex parte application. Once the court has been satisfied that the rule 243.1(d) standard is met, a party relies upon that ruling in submitting documents. The court already has satisfied itself that the documents contain sensitive information. Once a party has relied upon the sealing order in presenting records to the court, the ex parte procedure would disrupt the party's expectations of privacy without adequate notice. The problem of unsealing records on an ex parte basis carries a particular concern, because once those records have been unsealed, it may be difficult or impossible to "unring" the bell. CAJ is troubled by the possibility of setting aside a ruling sealing records, on one-day's notice, with a party's	while still preserving sufficient safeguards for all parties. Under rule 379, notice must be given on ex parte applications. Also, under the amended rules, regardless of whether a request to seal is made by motion or ex parte application, the court would be required to make all the factual findings required by 243.1(d). Indeed, amended rule 243.1(d) will clarify the need for express factual findings whenever a record is sealed. The committees disagreed that providing an ex parte procedure for unsealing records would be a problem. Ex parte applications under rule 379 would still require that notice be provided to all parties.

SPR03-10
Sealed Records
(amend Cal. Rules of Court, rules 12.5, 243.1, and 243.2)

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					confidential, sensitive information forever released to the public. Such ex parte applications should be granted only in the rarest of circumstances. Absent compelling need, parties should be required to proceed on a regularly noticed motion schedule. Accordingly, the rules should clarify the standard that should be met to obtain ex parte relief, to ensure that the party's rights in confidential material and expectations of confidentiality are met.	The committees are satisfied that the current ex parte procedures provide the proper standards for expedited relief and would adequately protect a party's interest in preserving the confidentiality of information in appropriate circumstances.
2.	General	Court Executives Advisory Committee, Judicial Council of California	A	Y	Supports the proposals regarding amendments to rules 12.5, 243.1, and 243.2 as submitted.	No response required.
3.	General	Mr. Stephen V. Love Executive Officer Superior Court of California County of San Diego	AM	N	1. When a party serves both a redacted and an unredacted copy of papers under amended rules 12.5(e)(4) and 243.2(b)(2), only the proof of service of the non-redacted papers should be filed. This proposed method could increase file storage and cause duplicative paperwork in files. 2. We strongly, oppose having the clerk retain the records pending 10 days written notification [as proposed in amended rules 12.5(e) and 243.2(b)(6)]. It would be difficult to monitor and the written request may not get matched up to the department in time to prevent unnecessary research by staff. Existing practice should not be changed. 3. There needs to be some provision in 243.2(b) and	This suggestion would create problems for judges if only the proof of service of the non-redacted copy were filed. Courts would often need to review the complete non-redacted document to make a ruling. The committees disagreed. Retaining the records for 10 days would not be too difficult or burdensome.

* These comments were reviewed by the Appellate, Civil and Small Claims, and Criminal Law Advisory Committees.

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	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					243.2(h) whereby a law enforcement agency and/or grand jury (state or federal) can gain access to the sealed file without notice to all parties where a party to the action is the subject of a criminal investigation.	Law enforcement or a grand jury could use subpoenas to gain access to these records. A special provision on this matter does not seem necessary.
4.	General	Ms. Glenda Mart Court Supervisor Legal Process Division Superior Court of California, County of Calaveras	A	N	1. Who is going to govern if a sealed item is mentioned in future filings? 2. Will it become the court's responsibility to make a tickler to the case to be able to place [sealed items] in the public file?	1. Parties are responsible for not disclosing contents of materials that have been sealed in any subsequently filed records or papers. (See amended rules 12.5(e)(9) and 243.2(e)(4).) 2. Clerks will need to track whether, under the sealing order, the file should be made public at some stage.
5.	General	Ms. Sandra Mason Director of Civil Operations Superior Court of Califfornia, County of San Luis Obispo	A	N	No comment.	No response required.
6.	General	Ms. Linda Robertson Supervising Attorney California Appellate Project San Francisco, California	AM	N	The proposed amendments to Rules 12.5, 243.1 and 243.2 are steps in the right direction, but in our view, they do not go far enough. We recommend that the rules be further amended to require that when a court proposes to unseal a record, it must give notice of the reasons why it believes the record does not fulfill the criteria for sealing set forth in	The Civil and Small Claims Advisory Committee agreed that a trial court proposing to unseal a record should provide a reason. It added to rule 243.2(h)(3) the words "stating

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					Rules 243.1(c) and (d), and that a court which orders a record unsealed must make findings explaining why the record should not be sealed. In our experience there have been practical problems with rule 12.5, because it permits a reviewing court to unseal records without making any findings or giving any statement of reasons for its action. Recently, the California Supreme Court has sent letters to attorneys whom we assist in capital appeals and habeas corpus proceedings, advising them that the court is considering unsealing, on its own motion, particular transcripts in the record on appeal. In each instance, the court has stated no reasons for its proposed action. Ultimately, in every case, the court has unsealed the records in question, again without explanation why it considered unsealing necessary or appropriate. Under rule 243.1(c) and (d), at least six separate factual findings are required to seal records. However, no findings are required to order them unsealed. Counsel seeking to respond to the Supreme Court's letters cannot determine which factor or factors supporting sealing may, in the view of the court, be absent. Consequently, counsel cannot respond to the court's actual reasons for considering unsealing the records, but must respond as if all the factors are at issue, when in fact this may not be the case at all.	the reason therefor." On the other hand, the Appellate Advisory Committee did not think a reviewing court should be required to specify the reasons it is considering unsealing records that were sealed at the trial court level. The committee noted that, in these circumstances, the reviewing court is not determining whether to reverse the trial court's order sealing records in the trial court. It is making an independent determination about whether it is appropriate for records in its own proceedings to be sealed. The Appellate Advisory Committee believes that, in these circumstances, the burden of justifying sealing in the reviewing court remains on the party who requested sealing and, therefore, that it is appropriate for such parties to address all of factors necessary for sealing under the rules. The committee further believes

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
						that if the rules required reviewing courts to state the reasons they are considering unsealing, reviewing courts would routinely articulate these reasons in broad terms such that the parties would still be required to address all of factors necessary for sealing under the rules. Thus, the committee believes that such a rule change would create additional hurdles for the court without appreciably narrowing the burden on the parties. The committee therefore did not support adding such a provision to rule 12.5. Amended rule 243.2(h)(4) will require the trial courts to consider the matters addressed in rule 243.1(c)–(e) in unsealing records. The court's consideration will be on the record.
					The fact that the rule does not require any statement of the reasons by a court for unsealing records creates other problems, as well. Rulings by trial and intermediate appellate courts are subject to review. However, the lack of any requirement that a court state any reasons for a decision to unseal (or not to seal) records effectively defeats review of those decisions by making it impossible to tell whether the court has misapplied any of the sealing criteria.	

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					The unsealing by an appellate court of records sealed in the trial court implicates other issues, such as reliance, where, for example, counsel and parties make statements in a hearing in camera, believing that they are protected from disclosure by orders making the proceedings confidential. And the unsealing of confidential records and proceedings may have serious consequences in the event of reversal and retrial. *Bittaker v. Woodford*, No. 02-99000 (9th Cir. June 6, 2003). In criminal cases such disclosure might implicate the defendant's constitutional rights to due process of law, the effective assistance of counsel, and the presentation of a defense at trial. (Id.) Under the current rules, records can be sealed only if findings are made that they meet the criteria reflected in rule 243.1(c) and (d). Transcripts and records that are sealed should not be unsealed without a commensurately careful and articulated procedure in which the party or court seeking unsealing articulates the reasons for its request, and the court then supplies findings for its decision to unseal.	
7.	General	James G. Snell and Huong T. Nguyen, Bingham McCutchen East Palo Alto, California	AM	Y	We have reviewed the proposed amendments to California Rules of Court 12.5, 243.1, and 243.2, and have a suggested revision. We think our proposed revision is essential to balance (1) the constitutional right of litigants to protect privacy rights and other confidential information (which constitute "overriding interest" under the rules) and the constitutional right of litigants to "adequate, effective, and meaningful" access to the courts with (2) the public's constitutional right to access court proceedings and records. We received and appreciate your invitation to comment on	The committees believe that the current and proposed amended rules strike the proper balance. (See responses to comment 1 above.)

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					the proposed rules and do so as follows. The proposed amendments circulated for comment attempt to clarify ambiguity in the rules regarding the process to be followed when a party provides documents it claims are confidential to another party who then seeks to file those documents with the Court by (1) adding a requirement that the providing party has ten days from the date another party lodges its confidential documents with the Court to file a motion to seal and (2) requiring that the documents supporting a motion to seal be served and filed in both a redacted and nonredacted form. These proposed rules, in practice (as we have experienced), would interfere with both litigants' constitutional rights to protect their private information and to have "adequate, effective, and meaningful" access to the courts. A hypothetical will demonstrate: An individual defendant files a motion for summary judgment against a plaintiff. In support of the motion, the defendant lodges with the court in sealed envelopes the plaintiff's medical records and the defendant's personal financial information. The defendant opposes sealing of the plaintiff's medical records and the plaintiff opposes sealing of the defendant's financial information. Related medical records and personal financial information are cited in the summary judgment opposition and reply briefs.	It is correct that additional procedures would be added to deal with the situation where a party wants to use documents obtained through discovery and is not concerned whether they are filed under seal, but the party who produced the documents is concerned and would want to bring a motion to seal. The committees disagreed. The procedures for considering motions to seal are necessary to adequately protect the public's right to access to court records as well as parties' rights to show that certain records should be placed under seal.

* These comments were reviewed by the Appellate, Civil and Small Claims, and Criminal Law Advisory Committees.

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					Under the proposed rules, this one summary judgment motion would generate eighteen separate sealing filings (each of which needs to be served in redacted and unredacted form) and six different hearings! The following illustrates the hypothetical: Defendant files a Summary Judgment Motion ("SJM") on January 1, 2004 with the hearing set for March 16, 2004. The SJM contains materials designated confidential by both sides. 1. Defendant files a motion to seal its medical information cited in the SJM with supporting declarations on January 1, 2004. 2. Plaintiff files opposition to motion to seal. 3. Defendant files reply brief. Hearing on the sealing motion on January 22, 2004. 4. Plaintiff files motion to seal its financial information cited in the SJM with supporting declarations on January 12, 2004. 5. Defendant files opposition brief. 6. Plaintiff files reply brief. Hearing on the sealing motion on February 2, 2004. Plaintiff files opposition to SJM on March 2, 2004, which includes material designated confidential by both sides. 7. Plaintiff files motion to seal its financial information cited in the opposition to SJM with supporting declarations on	Although the procedures for sealing records may sometimes be complicated, this example is rather untypical. Courts and parties will often be able to simplify the process. The new provisions allowing for ex parte applications should further reduce the extent of the problem.

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					March 2, 2004. 8. Defendant files opposition to motion to seal. 9. Plaintiff files reply brief. Hearing on the sealing motion on March 23, 2004. 10. Defendant files motion to seal its medical information cited in the opposition to the SJM with supporting declarations on March 12, 2004. 11. Plaintiff files opposition brief. 12. Defendant files reply brief. Hearing on the sealing motion on April 2, 2004. Defendant files reply to SJM on March 11, 2004, which includes material designated confidential by both sides. 13. Defendant files motion to seal its medical information cited in the reply to SJM with supporting declarations on March 11, 2004. 14. Plaintiff files opposition to motion to seal. 15. Defendant files reply brief. Hearing on the sealing motion on April 1, 2004. 16. Plaintiff files motion to seal its financial information cited in the reply to SJM with supporting declarations on March 22, 2004. 17. Defendant files opposition brief. 18. Plaintiff files reply brief. Hearing on the sealing motion April 12, 2004. The defendant's three separate sealing motions in the above	

	Rule	Commentator	Position	Comment on behalf of group?	Comment	Committees' Responses *
					example likely would include similar arguments and supporting evidence since they all relate to medical records. Likewise, the plaintiff's three sealing motions would likely include similar arguments with regard to financial information. Yet the parties would have six different hearings before the court. In addition, the parties may have to file thirty-six different memoranda of points and authorities, including eighteen non-redacted motions (in addition to redacted and unredacted declarations and exhibits) to be lodged with the court and eighteen publicly-redacted motions (in addition to redacted and unredacted declarations and exhibits) to be lodged with the court. The process of dealing with six motions to seal documents related to one summary judgment motion would significantly increase the costs of the parties. In many cases, the costs to seal constitutionally protected information may exceed the cost of the substantive motion. At times, the cost may be prohibitive, particularly when the party is a small company or an individual litigant. Yet, this cost is unavoidable if the party wants to ensure its constitutional privacy rights are protected. The burden on the court to review and rule on six different motions to seal in connection with one summary judgment motion is also a significant drain on judicial resources. In our experience, courts find it confusing, frustrating and a waste of scarce judicial resources to review and rule on several different related motions as opposed to a single sealing motion addressing all relevant issues.	The proposed ex parte application procedures that would be allowed under the amended sealed records rules should permit this process to be simplified in an appropriate case. Litigants and courts could take other measures to coordinate the motions and applications and to reduce the number of filings and hearings. It is correct that, if the court after a hearing requires that the redacted versions be modified,

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					Moreover, in the event that the court agrees after a hearing to seal only some of the information the parties seek sealed, each party will have to file second public redacted versions of the summary judgment filings and presumably public redacted versions of the motions to seal. This will likely require line-by-line editing of the filings since the sealing should be narrowly tailored. The possibility that confidential information (in many cases constitutionally protected material) will be inadvertently disclosed in one of the many public versions is real and irreversible. When applied to multi-party complex litigation, the above hypothetical can become exponentially more complex. We do not think the above process is constitutionally required. Indeed, we think it interferes with both a litigant's constitutional right to protect private information and the constitutional right of access to the courts to have disputes resolved. "The right of access to the courts has been described as 'one aspect of the right to petition' protected by the First Amendment. *Los Angeles* (979 F.2d at 706 (citation omitted)). The United States Supreme Court recognizes the right to petition government as "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). "The right of access to the courts is substantive, rather than procedural, and thus "cannot be obstructed, regardless of the procedural means	the parties will need to prepare such versions. If the parties carefully prepare the redacted versions, there should not be a problem with disclosure of confidential information. The alternative of allowing documents that have been overbroadly sealed to remain under seal is not legally justified. While the process described may occasionally be cumbersome, the committees disagreed that the current or proposed sealed record rules interfere with litigants' constitutional rights of access. These rules should be applied in a reasonable and practical manner to the extent possible. But they should not be fundamentally altered because they preserve important constitutional rights. The committees disagreed.

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					applied'." *Acevedo v. Surles*, 778. An administrative scheme that imposes enormous financial burdens on a litigant chills the affected party's rights to seek judicial review. *See Louisiana Pacific*, 842 F. Supp. at 1252. We think the burdens that would be imposed by the proposed rules, as illustrated above, would interfere with litigants' constitutional rights "to pass through the courthouse doors and present one's claim for judicial determination." *Los Angeles*, 979 F.2d at 706. Both the public's right to review court documents and a litigant's right of access to the courts are safeguarded by the First Amendment. Constitutional provisions should be interpreted to avoid contradictions in the text and any potentially discordant constitutional provisions should therefore be construed harmoniously. *Florida Sugar Mktg. & Terminal Ass'n., Inc. v. United States*, 220 F.3d 1331, 1337 (Fed. Cir. 2000). To harmonize the litigants' First Amendment right of access to the courts and litigants' constitutional rights to privacy with the First Amendment right of public access to court filings, we propose that the Rules of Court be amended to (1) require the filing of all motions to seal related to a substantive motion 10 days after the hearing on the substantive motion, and (2) require the filing of public redacted versions only after the court rules on the motion to seal. This process would recognize and protect litigants' constitutional rights, more efficiently use judicial resources,	The committees disagreed with these proposed amendments to the rules. The public's right of access to court records requires that the court review the records proposed to be sealed *before* it adjudicates the merits of a motion. The commentators' proposal would deny the public access to records in all cases until *after* the court had ruled. This would not be consistent with *NBC Subsidiary* and other

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					and ensure that the public has access to material filed with the court in a timely manner unless the material satisfies the five-part test enunciated in *NBC Subsidiary*. The above suggestion strikes the appropriate balance between the competing rights. First, the rules allow anyone who wants to exercise their right of access to court records to seek immediate relief from the court to unseal documents, notwithstanding the normal motion to seal procedure for such documents. *See* Cal. Rules of Ct. 12.5(f)(1), 243.2(h); Proposed Rules 12.5(f)(2), 243.2(h)(2). In addition, the trial or appellate court may unseal a record on its own motion, for example, to provide the public access to an important matter of public concern. Cal. Rules of Ct. 12.5(f)(2), 243.2(h). Thus, in cases where the public seeks access, court review can be expedited. Second, in the majority of cases where no one is actively seeking to exercise their First Amendment right to review the public filings, the modest delay we propose is reasonable. The rules currently in effect already allow at least a twenty-one day delay in the public filing of documents lodged with the Court while the motion to seal is pending. *See* Cal. Code Civ. Proc. § 1005(b); Cal. Rules of Ct. 12.5, 243.1, 243.2. Under the proposed rules circulated for comment, that time period would be extended another ten days. Our proposal, would add only the hearing period for the underlying motion (21 days for most motions and 75 days for summary judgment motions).	First Amendment decisions on access to court records and hearings. There is a significant difference between a delay in publicly filing the documents that a party wants to be sealed while the court is considering the motion to seal and waiting to consider the motion to seal until *after* the court has ruled on the underlying motion. As the CAJ pointed out, Justice Blackman once observed, "[p]ublic confidence cannot long be maintained where important judicial decisions are made behind closed doors, with records supporting the court's decision sealed from public view." *Gennett Co. v.*

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					By contrast, a much longer delay is sanctioned in the Civil Code adoption of the Uniform Trade Secrets Act whereby alleged trade secrets are protected for the length of the lawsuit. *See* Civ. Code § 3426.5 ("In an action under [the Uniform Trade Secrets Act], a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include . . . sealing the records of the action[.]").	*DePasquale* (1979) 443 U.S. 368, 429 (citation omitted; Blackman, J., concurring and dissenting). The committees disagreed that the commentators' proposal would be consistent with the *NBC Subsidiary* decision.
					Contrary to the Council's concerns, our proposal is consistent with *NBC Subsidiary v. Superior Court*, 20 Cal. 4th 1178, 1219 (1999). *NBC Subsidiary* recognizes that constitutional interests must be balanced. *Id.* at 1197, 1216, 1222 (recognizing that statute should be construed to avoid serious constitutional questions and that right to a fair trial guaranteed in constitution is a right that can trump First Amendment right of access). Moreover, *NBC Subsidiary* recognizes that delayed access to court proceedings is often warranted. *Id.* at 1204 (quoting Supreme Court's recognition that release of transcripts of closed voir dire proceedings within a reasonable time might properly balance jurors' privacy rights with public's right of access) & n. 37 (recognizing that sealing rules should be flexible and citing cases approving after-the-fact hearings to determine whether transcripts of closed hearings should remain sealed). We think the proposed rules as currently drafted apply *NBC Subsidiary* too narrowly and rigidly and that our proposal appropriately balances the litigants' and public's constitutional rights, and breathes practical life into the	There is a important difference between determining whether transcripts of closed hearings should remain sealed and whether documents to be used as a basis for adjudicating a motion should be sealed. There is no comparable justification for after-the-fact determinations in the latter case. Generally, the application of the sealed records rules has not interfered with trial delay

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					holding of *NBC Subsidiary*. Our proposal is also in line with the goals of the Trial Court Delay Reduction Act and related standards adopted by the Judicial Council that recognize the need for the efficient resolution of cases. *See* Standards for Judicial Administration § 2 (the standards adopted "enable the just and efficient resolution of cases"); Cal. Rules of Ct. 204.1; *compare* Fed. R. Civ. P. 1 (The Federal Rules of Civil Procedure provide for its rules "[to be construed] and administered to secure the just, speedy, and inexpensive determination of every action."). Exposing parties to the potential for multiple sealing filings in redacted and unredacted form, as illustrated above, would run counter to these goals by increasing expenses to parties and the burdens on courts.	reduction. But if in a particular case additional time is required to give effect to the sealed records rules, courts should be flexible about case time disposition goals to preserve important constitutional rights. Although the sealed records rules may impose some additional costs on parties and burdens on the courts, those will sometimes be necessary to give effect to the First Amendment principles embodied in the rules.
8.	12.5	Committee on Appellate Courts, State Bar of California San Francisco, California	N	N	The Committee reviewed and analyzed the proposed changes to the appellate court rules and the trial court rules—insofar as those rules are interrelated—but limits its comments to the appellate court rules, the Committee's particular area of expertise. The Committee is concerned with the proposed amendments that relate to petitions and ex parte applications to unseal records in the appellate courts. Rules 12.5(f)(2), as proposed to be amended, would authorize the filing of an ex parte application to unseal records in the appellate court, without any notice to the affected parties, and without giving all affected parties an	All requests to seal or unseal a record on appeal—whether by motion, petition, or

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					opportunity to be heard prior to the court's ruling. Rule 12.5(f)(2) would also be amended to provide that requests to unseal records may be made by a petition brought by a non-party. There is not, however, any indication of the procedure that would need to be followed in connection with such a petition, to ensure that the affected parties are provided with adequate notice and an opportunity to be heard. The Committee believes it is particularly important to require pre-ruling notice for all requests in an appellate court to *unseal* records, and a reasonable opportunity for all affected parties to file opposing papers prior to the court's ruling, because once records are unsealed and made a part of the public record, any damage to an affected party (with respect to the immediate public dissemination of potentially private and otherwise confidential matters that a court had necessarily already ruled should be sealed) would be both irreparable and significant. The Committee recommends that proposed rule 12.5(f)(2) be amended to delete the word "application" entirely, and to specify that any motion or petition to unseal be governed by rule 41, so the rule would read as follows: "Any person or entity may serve and file a motion, ~~application~~ or petition in the reviewing court to unseal a record. <u>The provisions of rule 41 concerning motions in the reviewing court will apply to any such motion or petition</u>. If necessary to preserve confidentiality, the motion, ~~application or~~ petition, any opposition, and any supporting documents	application—must be served and filed. So notice of application would be given to all parties. Because under certain circumstances, it may be appropriate to provide for expedited application procedure, the ex parte application process should be retained in the amended rules. The committees disagreed. While rule 41 should generally be followed, an application may be the proper method for seeking relief under the appropriate circumstances. Furthermore, rule 41 is a general provision that applies to all motions in a reviewing

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					must be filed in both a public redacted version and a sealed complete version."	court. Adding a specific cross-reference to rule 41 in rule 12.5 may inappropriately create the implication that rule 41 does not apply where other rules provide for motions but do not specifically reference rule 41.
9.	12.5	Mr. Robert Gerard President Orange County Bar Association Irvine, California	AM	Y	Rule 12.5(e) regarding motions or applications to file records under seal, which were not filed in the trial court, should be modified to include procedures for opposing such motions. At present, the rule makes no provisions for opposing such unusual motions.	The procedures for opposing motions in rule 41 would apply to appellate motions to file a record under seal. No special rule on this subject is necessary.
10.	243.1	Hon. Ronald L. Bauer Orange County Rules and Forms Committee Superior Court of California, County of Orange	AM	Y	Modify language in rule 243.1(a)(2) to read: "These rules do not apply to records that are required to be kept confidential by law and search warrant applications or other documents pursuant to *People v. Hobbs* (1994) 7 Cal. 4th 948."	Agreed in principle. The point has been incorporated into the Advisory Committee Comment on rule 243.1.
11.	243.1	Hon. Dennis E. Murray Presiding Judge Superior Court of California, County of Tehama	AM	N	1. Rule 243.1 needs to either define "court order" or otherwise make clear that the rule does not apply to magistrates. These rules are unworkable when applied to, for example, a search warrant affidavit issued in a magistrate/judge's living room at 3:00 am. Unfortunately, neither the media nor their attorneys understand that a declaration sealed by a magistrate is not a "court" proceeding. 2. I believe there needs to be a specific exemption for	1. Agreed in principle. This situation is covered by *People v. Hobbs* and Penal Code Section 1534, and is referenced in an amended Advisory Committee Comment to rule 243.1. 2. Disagreed. Evid. Code, §

* These comments were reviewed by the Appellate, Civil and Small Claims, and Criminal Law Advisory Committees.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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					records sealed under Evidence Code § 1040 et. seq. 3. This proposal came from the Appellate Committee and the Civil and Small Claims Committee. I believe the Criminal Law Committee has also been addressing this issue.	1040 et. seq. addresses evidence whereas rule 243.1 et seq. addresses access to court records. 3. Agreed; it has.
12.	243.2	Ms. Julye Setzer Court Manager Superior Court of California, County of Sacramento	AM	N	The process of accepting documents conditionally filed under seal is very staff intensive and requires a method for tracking the filing of motions or applications for an order sealing the record. There is no requirement that proof of service on the party who produced the documents under rule 243.2(b)(3) is required when the documents are presented to the court. Often the document that is being submitted conditionally under seal is the complaint, which poses problems with requiring a proof of service. I recommend that the burden be placed on the party filing the documents under seal versus the court. Under rule 243.2(b)(3)(B), the clerk must hold documents for 10 days before returning them to the party. I recommend deleting the requirement. Papers should be returned to the party. If that party wants the papers to be part of the file, they may resubmit them for filing with the clerk's office.	The issue raised by the commentator is not entirely clear. To the extent the commentator is suggesting that documents should not be conditionally lodged because this might be burdensome on court staff, the committees disagreed. The court will often need to review those documents to rule on the motion. The committees disagreed. The provision that the clerk must retain the records for 10 days is not too difficult or burdensome. It will simplify the overall procedures.
13.	243.1 and 243.2	D'vora Tirschwell Writ Attorney First Appellate District, Court of	AM	N	In addition to the proposed amendments, I suggest that rules 243.1 and 243.2 be amended to explicitly state that the trial court must enter a written order granting (or denying) a sealing request. It seems implicit in the existing rules that	The committees did not regard a written order as necessary in every case so long as the requisite findings are made.

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		Appeal San Francisco, California			such an order is required (see rules 243.1(d) (1)–(5), 243.1(e) (1), 243.2(e) (2)) but to the extent any confusion exists on this point (which to my bewilderment actually does exist), it seems advisable to make the written order requirement explicit.	Thus, the committees do not recommend changing the rules in this respect.